STATE OF INDIANA

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IN THE MATTER OF THE INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR'S COMPLAINT AND REQUEST FOR COMMISSION INVESTIGATION OF MICRONET, INC. AND H.T. TELESERVICES FOR VIOLATIONS OF INDIANA CODE 8-1-29-5 AND I.C. 8-1-29-5.5, REQUEST FOR CIVIL PENALTIES UNDER I.C. 8-1-29-7-5, REQUEST FOR ALL OTHER APPROPRIATE RELIEF	))))))))))	**CAUSE NO. 41546-SC-05** **CAUSE NO. 41546-SC-06** **CAUSE NO. 41546-SC-07** **(CONSOLIDATED)**

FILED

SEP 14 2005

INDIANA UTILITY
REGULATORY COMMISSION

You are hereby notified that on this date the Indiana Utility Regulatory Commission ("Commission") has caused the following entry to be made:

On June 21, 2005, the Indiana Office of Utility Consumer Counselor ("OUCC") filed its complaint and request with the Indiana Utility Regulatory Commission ("Commission") for Commission investigation of Micronet, Inc. and H.T. Teleservices ("Micronet," "HTT," or "Respondents") pursuant to I.C. §§8-1-29-5 and 8-1-29-5.5.

On July 14, 2005, Respondents filed under Cause No. 41546-SC-07 their *Motion to Dismiss on Grounds of Lack of Personal and Subject Matter Jurisdiction and for Failure to State "Cramming" Violations under Indiana Law.* Concurrently, Respondents filed essentially identical motions in Causes 41056 SC 05 and 41546 SC 06, requesting that all the cases be consolidated because of the unanimity of allegations and parties. The matters were subsequently consolidated as captioned above by our *Scheduling and Consolidation Order* of August 10, 2005, which also set forth the procedural schedule in this matter.

On August 4, 2005, the OUCC filed its *Brief in Opposition to Motion to Dismiss* and its *Designation of Evidence*. On August 16, 2005, Respondents filed their *Motion to Strike* and their *Reply Brief in Support of Motion to Dismiss*. On August 30, 2005, the OUCC filed its *Brief in Opposition to Motion to Strike* and *Motion to Compel and Request for Sanctions*. On September 9, 2005, Respondents filed their *Reply in Support*

of Motion to Strike and *Response to OUCC's Motion to Compel and Request for Sanctions.*

We issue this entry today to resolve the *Motions to Dismiss* and *Motion to Strike.* We note that the discussion of the issues is somewhat interrelated, since issues related to the *Motion to Strike* impact our reasoning in evaluating Respondents' *Motions to Dismiss.*

1. Motions to Dismiss.

Respondents argue dismissal of this action on the following grounds. Respondents argue that the Commission lacks personal jurisdiction over HTT because its role was limited to that of Micronet's billing agent; that the Commission lacks subject matter jurisdiction over the provision of directory assistance by Micronet; and that the OUCC has failed to present evidence of cramming violations as defined under Indiana law. Respondents have also argued that the OUCC's allegation that HTT is an "alter ego" of Micronet confuses personal liability with personal jurisdiction. Respondents assert that if the Commission exercises jurisdiction over "non-public utility entities and non-public utility services," this will result in a chilling effect on "innovative service and billing offerings in Indiana," including "otherwise unregulated entities who use 1-800 lines to access information stored on automated computer databases." *Respondents' Reply Brief in Support of Motion to Dismiss*, at 17.

a. Lack of personal jurisdiction under T.R. 12(B)(2).

Although the Commission has its own procedural rules, relevant Indiana Trial Rules form the backdrop for our examination. *See*, 170 I.A.C. 1-1.1-26(a). As a preliminary matter, we will address the issue of personal jurisdiction first.[1]

"Personal jurisdiction is 'a court's power to bring a person into its adjudicative process' and render a valid judgment over a person." *Anthem Insurance Cos., Inc. v. Tenet Healthcare Corp.*, 730 N.E.2d 1227, 1231 (Ind. 2000) (*citing* Black's Law Dictionary.) In determining whether or not personal jurisdiction exists, we must determine "whether the conduct falls under the long-arm statute and then whether it comports with the Due Process Clause[.]" *Id.* at 1232. The relevant parts of Indiana's long-arm statute, T.R. 4.4(A), state that a non-resident organization submits to the jurisdiction of the courts of this state "as to any action arising from the following acts committed by him or her or his or her agent: (1) doing any business in this state...(3) causing personal injury or property damage in this state by an occurrence, act or omission done outside this state if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue of benefit from goods, materials, or services used, consumed, or rendered in this state; (4) having supplied or contracted to supply services rendered...in this state[.]"

[1] While Respondents argue that there is a lack of personal jurisdiction over HTT, the focus of Respondents' pleadings appears to center on issues of subject matter jurisdiction.

This requires the exercise of personal jurisdiction over Respondents. Under varying constructions of the bare facts at bar, both Respondents have done business in this state, whether by providing a service or billing for that service; they are both alleged to have caused injury; and they have both derived benefit from services "used, consumed, or rendered" in Indiana.

The second element of the personal jurisdiction inquiry requires us to examine whether exercise of that jurisdiction comports with Due Process. There must be "continuous and systematic contacts with the forum state such that the defendant could reasonably foresee being haled into court in that state for any matter." *Id.* at 1234. For specific personal jurisdiction, a defendant must have purposefully established contacts with the forum state and the action at bar must arise from those contacts. *Id.* at 1235. In this case, Respondents purposefully engaged in conduct in Indiana, and the action at bar has arisen as a result, satisfying this prong of the personal jurisdiction inquiry.

Finally, we must determine whether the exercise of personal jurisdiction over Micronet and HTT "offends traditional notions of fair play and justice." *Id.* at 1236 (citations omitted.) Five factors must be examined: the burden on defendant (Respondents); the forum state's interest in determining the dispute; the plaintiff's (OUCC's) interest in obtaining effective and convenient relief; the interstate judicial system's interest in judicial economy; and the shared interest of the states in furthering substantive social policies. These factors weigh heavily in favor of our exercise of jurisdiction: the state, as embodied by both the Commission and the OUCC, has a statutorily mandated interest in resolution of this dispute. When taken in context, "the relationship among the defendant, the forum and the litigation...and the [lack of] existence of an alternative forum to hear the dispute" compels us to reach this result. *Id.* at 1237. We therefore find that this Commission has personal jurisdiction over both Respondents.

b. Lack of Subject Matter Jurisdiction under T.R. 12(B)(1).

i. Micronet.

A. "Micronet does not meet the definition of a public utility."

Micronet states that it does not meet the definition of a public utility, and therefore is not within reach of the Commission's jurisdiction.

The definition of a public utility under I.C. 8-1-2-1 includes any corporation that "manage[s], or control[s] any...equipment for the conveyance of ...telephone messages." Micronet's CTA No. 0403-3 was granted by the Commission on March 16, 2004 for authority to provide resold "[WATS] service and/or interexchange, intrastate telecommunications services within the State of Indiana." That application was made "in accordance with and subject to the provision of the [Commission's] Orders in Cause No. 38149, and the process established by the....January 14, 1998 [order] in that Cause." That Order established the process by which entities could obtain a Certificate of

Territorial Authority through an abbreviated, thirty-day process, which Micronet used. While shortening the process by which entities might obtain authorization to provide certain telecommunications services in the state, the Commission also emphasized that the order did not remove such entities from Commission oversight.

> [N]othing in this Order should be construed as limiting our jurisdiction over resellers of WATS service and interexchange, intrastate telecommunications services for consumer complaints .... We want to be very clear that resellers of WATS and interexchange, intrastate telecommunication services **are public utilities as defined by the Public Service Commission Act**, as amended, and as such, are subject to continuing jurisdiction of the Commission and should continue to comply with Indiana laws and applicable Commission regulations and orders.

In the Matter of an Investigation to Determine the Extent of Regulation of Wide Area Telephone Service (WATS) Resellers by the Commission Pursuant to Public Law 92-1985, I.C. 8-1-2.6-1, Cause No. 38149, Seventh Supplemental Order, 1998 Ind. PUC LEXIS 164, at 19 (January 14, 1998) (emphasis added.)

As a part of the application Micronet made to the Commission, it indicated that it would "comply with Indiana laws and the Commission's regulations and orders of generic application[.]" Exhibit C, OUCC's *Designation of Evidence*, p.2. Micronet states that it "cannot consent to subject matter jurisdiction" and cites *Indiana Bell Tel. Co. v. Indiana Utility Reg. Comm.,* 715 N.E.2d 351, 358 (Ind. 1999) for the proposition that a party's "voluntary submission to jurisdiction has no bearing on the scope of the Commission's jurisdiction." While we do not disagree with this statement as a general principle, Micronet applied to the Commission to provide services within the state, and as a part of that application, indicated that it would "comply with Indiana laws and the Commission's regulations and orders of generic application[.]" The Commission acted within its statutory powers in designing and implementing the process by which entities seek and obtain Certificates of Territorial Authority, and likewise acts well within its statutory power in exercising jurisdiction over Micronet as a public utility.

B. "Micronet does not provide a telecommunications service as defined by the statute."

Micronet asserts that their provision of directory assistance does not qualify as telecommunications service, and that they are therefore not "telecommunications providers" subject to allegations of slamming and/or cramming. We concur with the position of the OUCC that a plain reading of the statute renders the provision of directory assistance a "telecommunications service." As cited, I.C. 8-1-29-2 defines telecommunications as "the electronic transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information sent and received." The directory assistance provided by Micronet meets that definition, and since Micronet charges for the right to obtain directory assistance, they meet the definition of a telecommunications provider under I.C. 8-1-29-3

and 4. As they provide a telecommunications service, and are a telecommunications provider, they are subject to Commission jurisdiction.

C. "Micronet is not a PIC or LEC subject to slamming or cramming rules."

Micronet argues that the cramming and slamming rules cannot cover it because it does not qualify as either a PIC or a LEC. This argument is also unavailing. A PIC (primary interexchange carrier) is defined as a provider of "presubscribed inter-LATA or intra-LATA long distance telecommunications." 170 IAC 1.1-19(a)(5). Included in that definition are "[p]resubscribed facilities-based carriers of long distance service, resellers of long distance service, and local exchange carriers providing long distance service;" the rule also notes that consumers may receive presubscribed services from more than one carrier. *Id.* Based on the CTA granted by this Commission, Micronet was given the authority to provide WATS and/or interexchange, intrastate services. As a reseller of long-distance service they fall within the definition of a primary interexchange carrier. We therefore find that Micronet meets the definition of a PIC, as set forth above.

D. "The Commission cannot regulate Micronet as a stand-alone directory assistance provider; Micronet provides an 'enhanced service,' outside Commission jurisdiction."

Micronet also argues that the Commission cannot regulate it because it is a "stand alone directory assistance" provider providing enhanced services outside the Commission's jurisdictional reach. We disagree on two grounds.

In support of this position, Micronet cites the FCC Computer II proceeding regarding enhanced services. *Amendment of Section 64.702 of the Commission's Rules and Regulations,* 77 FCC 2d 384 (1980). Micronet does recognize later action by the FCC in *Provision of Directory Listing Information under the Telecommunications Act of 1934,* CC-Docket No. 99-273, 16 FCC Rcd 2736 (released January 23, 2001.) Micronet does so for the very limited and somewhat misleading reference to the FCC's recognition of the existence of "a certain group of non-certificated directory assistance providers operating outside of federal or state regulation." *Respondent's Reply Brief in Support of Motion to Dismiss,* p. 10.

However, that FCC recognition was limited as follows:

> If a competing directory assistance provider does not complete the call either through its own facilities **or through resale and impose a separate charge for such service**, but rather simply passes a call to another entity that provides all elements of call completion (i.e. that completes the call and charges the customer for the service), the competing directory assistance provider is not providing telephone exchange service within the meaning of section [47 U.S.C. 153] 3(47).

Provision of Directory Listing Information under the Telecommunications Act of 1934, 16 FCC Rcd 2746-47, ¶22 (emphasis added.)

While the above states that such a carrier is not providing "telephone exchange service," it does *not* state that the entity is not a telecommunications provider. Micronet buys 1-800 service and resells it to its customers, and separately charges for it. *Respondents' Reply Brief in Support of Motion to Dismiss*, p. 15. As such, they do not fall within the exception cited above.

We concur with the OUCC that to the extent that there is FCC regulation of directory assistance providers, there is also allowance for enforcement of other, non-conflicting state laws. This is certainly inherent in the FCC's orders, in the recognition of the difficulties experienced by entities certified by state commissions in their provision of directory assistance. *Provision of Directory Listing Information under the Telecommunications Act of 1934,* 16 FCC Rcd 2746-47, at ¶14. *See also, In the Matter of Implementation of the Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information,* CC Docket No. 96-115, 20 FCC Rcd 9334, 9337 (released May 3, 2005.) This recognizes that directory assistance providers can be and are certified by state commissions, and by extension, are regulated by them. Such is the case here.

We also find that Micronet cannot prevail in its claim that it provides an unregulated "enhanced service" outside our jurisdiction. Micronet offers Exhibit B to their *Motion to Dismiss*, in which Micronet refers to its product as "enhanced directory assistance," as proof that they are exempt from regulation. Micronet can call its service "enhanced," if it wishes to do so for marketing purposes. However, that label is not determinative of the classification of the service from a regulatory perspective.

The FCC has made clear statements regarding the classification of "enhanced services." The following excerpt is illustrative and not unique.

> [T]he Commission has found that services it had previously classified as "adjunct-to-basic" should be classified as telecommunications services. These are services that fall within the literal definition of an "enhanced service" set forth in the Commission's rules, but are basic in purpose and facilitate the completion of calls through utilization of basic telephone service facilities. They include, *inter alia,* speed dialing, call forwarding, computer-provided directory assistance, call monitoring, caller identification, call tracing, call blocking, call return, repeat dialing, and call tracking...
>
> The Commission has consistently categorized a service option or feature as adjunct-to-basic, and thus subject to Title II regulation, if that option or feature is clearly basic in purpose and use, and brings maximum benefit to the public through its incorporation in the network. For example, the Commission has addressed whether access to a database through directory assistance that searches for a listing by name may be offered as an adjunct-to-basic telephone service. Because a subscriber using directory assistance retrieves information stored in a telephone company's computer database, directory assistance appears to fit within

> the definition of an enhanced service. The Commission, however, found such access to be adjunct-to-basic, rather than enhanced service, because directory assistance provides only that information necessary for a subscriber to place a call. The Commission has also held that electronic directory assistance is an adjunct-to-basic service because, as with operator-assisted directory assistance, the purpose of the service is to facilitate the placement of telephone calls. In contrast, reverse directory service (where a customer knows a telephone number and seeks to learn the name of the number holder) supplies information that is not necessary to complete a call, and is therefore an enhanced service.

In the Matter of the Implementation of Section 255 of the Telecommunications Act of 1996, 13 FCC Rcd 20391, 20412 ¶¶39-40 (released April 20, 1998) (footnotes omitted), citing *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,* CC Docket No. 96-149, 11 FCC Rcd 21905, 21958 (released December 24, 1996; *see also In the Matter of the Petition of US West Communications Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance,* 14 FCC Rcd 16252, 16285, ¶61 (released September 27, 1999.)

It is quite clear: while meeting the *technical* definition of an "enhanced service," directory assistance is a *telecommunications service* subject to regulation. Micronet provides a service that is classified as a telecommunications service, both as defined by our statute and by the FCC.[2]

For all the foregoing reasons, we find we have subject matter jurisdiction over Micronet.

ii. HTT

Respondents state that "HTT's role was limited to 'billing' end user customers," and that the Commission has no subject matter jurisdiction over HTT as a consequence. *Respondents' Reply Brief in Support of Motion to Dismiss*, p. 5.

Our Supreme Court has noted that "[i]f the facts...are not in dispute, then the question of subject matter jurisdiction is purely one of law." *GKN Co. v. Magness,* 744 N.E.2d 397, 401 (Ind. 2001). In making a determination on subject matter jurisdiction, we "may consider not only the complaint and motion but also any affidavits or evidence submitted...and may weigh the evidence to determine the existence of the requisite jurisdictional facts." *Id.* at 400.

Our rules against slamming and cramming specifically mention billing agents under 170 IAC 7-1.1-19(o). "[N]o PIC or LEC or any billing agent acting for said PIC or

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[2] We also note that when the FCC made a determination that previously designated "enhanced services" now should be qualified as "information services," it did not include directory assistance as an information service. *See, In the Matter of the Implementation of Section 255 of the Telecommunications Act of 1996*, 13 FCC Rcd at 20411, ¶38.

LEC shall bill a customer for any service unless the PIC, LEC, or billing agent" follows the rules regarding the letters of agency. As we have found that Micronet qualifies as a PIC, HTT as its billing agent clearly falls under the provisions contained in 170 I.A.C. 7-1.1-19(o). The clear language of the rules against slamming and cramming require that we exercise jurisdiction over HTT.

Respondents offer the contract between them as proof that the Commission has no jurisdiction over HTT. Respondents' *Motion to Dismiss*, Exhibit A. The only proof this provides, however, is that there is a contract between HTT and Micronet. It does not prove that the Commission cannot exercise jurisdiction.

We find we have subject matter jurisdiction over HTT.

c. Motion to Dismiss for Failure to State a Claim Upon which Relief May be Granted under T.R. 12(B)(6).

Having determined that the Commission has both personal and subject matter jurisdiction over Respondents, the crux of Respondents' arguments on T.R. 12(B)(6) fall away. Based on the finding that Micronet is a telecommunications service provider providing a service under our jurisdiction, the allegation that such services were placed on consumers' bills without their authorization clearly meets the requirements of a facially sufficient complaint. The question is whether there is a redressable claim, and we find that there is. The standard for the grant of a motion to dismiss is that it must appear to a certainty that a plaintiff will not be entitled to relief under any set of facts. *Thomson Consumer Elecs. v. Wabash Valley Refuse Removal,* 682 N.E.2d 792 (Ind. 1997). The question of the OUCC's chances of prevailing on these complaints is an open question. We cannot conclude with certainty that the OUCC will not be entitled to relief under any set of facts.[3]

2. Respondents' Motion to Strike

In its *Designation of Evidence* the OUCC submitted exhibits which the Respondents seek to strike on a number of grounds. For clarity of the record and ease of reference, we set out the content of the exhibits as follows:

[3] We need not resolve the dispute over whether the various motions have or have not been converted a T.R. 56 summary judgment motion by resort to evidence outside the pleadings. We agree with the OUCC that regardless of which standard is applied, the OUCC was entitled to rely on evidence outside the pleadings to respond to Respondents' motions. *Dixon v. Siwy,* 661 N.E.2d 600 (Ind. App. 1996). "The basic purpose of T.R.12 (B)(6) motion to dismiss is to test the legal sufficiency of the complaint to state a redressable claim....or, stated differently, to test the law of the claim, not the facts that support it." *Anderson v. Anderson,* 399 N.E.2d 391, 406 (Ind. App. 1979) (emphasis in original). Applying the standard for summary judgment, there must be no material facts in dispute, all evidence must be construed in favor of the non-moving party, and all doubts as to material issues must likewise be made in favor of the non-moving party. *Id.* As we have noted above, a number of important material facts central to the outcome of this case remain unresolved. As such, summary judgment would be inappropriate.

Exhibit A. Micronet's responses to the OUCC's first set of data requests.
Exhibit B. HTT's responses to the OUCC's first set of data requests.
Exhibit C. Certificate of Territorial Authority granted to Micronet by the Commission to provide resold intrastate interexchange services in Indiana.
Exhibit D. Copies of web pages from the website Wyomingvirtualoffice.com.
Exhibit E. Copy of web page for Micronet's website, phonebillsaver.com.
Exhibit F. Affidavit of Michael Eckert.

Respondents move that we strike all but Exhibits C and E, for the following reasons.

a. Exhibit A. Micronet's responses to the OUCC's first set of data requests.
Exhibit B. H.T. Teleservice's responses to the OUCC's first set of data requests.

Respondents argue that Exhibits A and B are irrelevant to the issue of jurisdiction, citing I.R.E. 401. We disagree.

In reference to each complaint listed in the OUCC's Petitions, Respondents state in Exhibits A and B that they previously believed that they had received authorized service requests, but now believed these charges to be authorized by unidentified third parties. Implicit in this response is that Micronet provided the services, and that HTT billed the consumers for those services. Evidence is deemed to be relevant if it tends to prove or disprove a material fact, even if the tendency is slight. *Houston v. State,* 730 N.E.2d 1247, 1250 (Ind. 2000.) The responses in Exhibits A and B are relevant because they show that Respondents did have a connection with the alleged cramming – whether or not that cramming is ultimately proved. This provides relevant evidence regarding the exercise of both personal and subject matter jurisdiction. We therefore deny the *Motion to Strike* regarding Exhibits A and B.

b. Exhibit D. Copies of web pages from the website Wyomingvirtualoffice.com.

Respondents attack Exhibit D on several grounds. The first is its alleged irrelevance to the question of jurisdiction under I.R.E. 401. This particular exhibit supports the OUCC's assertion of HTT's possible alter ego status regarding Micronet. Hence, its relevance is tied to that assertion, and to the extent that this information makes that issue more or less likely, it is therefore relevant. We therefore deny the *Motion to Strike* as to Exhibit D on the grounds of relevancy.

Respondents also raise that the material at issue in Exhibit D is attempting to "cast a cloud on Respondent's conduct," and that it therefore should be stricken under I.R.E. 404. However, I.R.E. 404 is not an evidentiary refuge for Respondents. "Evidence of a **person's** character or a trait of character is not admissible for the purpose of proving

action in conformity therewith on a particular occasion..." *Emphasis added.* I.R.E. 404 is aimed at character evidence as part of a criminal proceeding, although the federal courts have allowed the use of its federal rule counterpart where a civil party is alleged to have engaged in quasi-criminal conduct. *Perrin v. Anderson,* 784 F.2d 1040, 1044 (10th Cir. 1986); *accord*, *Bolton v. Tesoro Petroleum Corp.,* 871 F.2d 1266 (5th Cir. 1989.) That protection has not been extended to corporations, and therefore its use here is inapplicable.[4]

Respondents also state that Ex. D "contains no admissible evidence to answer the jurisdictional issues before the Commission," and then cite the definition of *relevant* evidence. First, we note that relevance and admissibility are not interchangeable. Secondly, the rules of evidence do not apply when a preliminary question of fact is to be determined under I.R.E. 101(c)(1). Further, the relevancy of evidence may be conditioned by the fulfillment of a condition of fact, subject to later "connecting up" under I.R.E. 104(b). This is thus not a reason to strike Exhibit D.

We therefore deny the *Motion to Strike* as to Exhibit D in its entirety.

Exhibit F. Affidavit of Michael Eckert.

Respondents move to strike paragraphs 3, 4, 6, 8, and 9 of Exhibit F, the affidavit of Mr. Eckert.

Paragraphs three and four are arguably to be stricken because the references to data requests do not bear on the issue of jurisdiction.[5] However, the content of these two paragraphs simply verifies that the documents attached as Exhibits A and B are true and accurate copies. Thus, even if these statements do not bear on a jurisdictional determination, they are innocuous and we therefore find that they should not be stricken.

Respondents argue that paragraph 8 should be stricken because it contains inadmissible information obtained during settlement negotiations, pursuant to I.R.E. 408. The OUCC asserts that the meeting at which the remarks were made was not a settlement negotiation. Respondents deny that any meeting occurred at all on that day. Regardless of the nature of the meeting or the date it occurred, I.R.E. 408 prohibits evidence regarding offers to compromise; it does not prohibit a "factual matter disclosed in the course of compromise negotiations [which] may be admissible at trial...the rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations[.]" *R.R. Donnelly & Sons Co. v. N. Texas Steel Co., Inc.*, 752 N.E.2d 112, 130 (Ind. App. 2001).

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[4] If it *were* applicable to corporations, the evidence would appear to be aimed at identity or absence of mistake or accident regarding Respondents, and therefore specifically excepted under I.R.E. 404(b).

[5] We say "arguably" because Respondents argument on this matter is limited to a statement that these paragraphs should be stricken "for the relevance reasons explained above." *Respondents' Motion to Strike,* ¶4.

In reviewing the statements that Respondents argue should be stricken, they appear to be factual matters that are otherwise discoverable. Specifically, paragraph 8 states, in its entirety, the following:

> I have met Frank Santa of Micronet on at least two occasions. At one of those meetings, he disclosed that he was Micronet's sole owner and that he bought the company sometime in February of 2005. When asked, he declined to disclose from whom he bought the company. At one or both of these meetings, he also indicated his office was located in Ohio.

The statements are not made as part of an offer to compromise, nor do they bear on the validity or amount of any negotiated claim. Mr. Santa's ownership of the company, the date he purchased it, and the location of his office, are items that are otherwise discoverable. His statement refusing to reveal the prior owner's name does not contain any evidence relating to negotiation, settlement or the validity of any claim. Hence, these statements do not meet the standard of I.R.E. 408 as cited by Respondents, and we so find that we should not strike them.

Respondents also state that the reference in ¶9 to pending discovery is not relevant to jurisdiction, and therefore should be stricken. In assessing this claim, we find that to the extent it may be true, it is nonetheless harmless. While technically the existence of pending discovery may not be determinative of jurisdictional issues, it likewise is not prejudicial to Respondents. Whether or not Respondents have answered certain discovery does not impact our decision. We view this is a statement of fact that may be considered innocent surplusage. We therefore find that this paragraph should not be stricken.

For all of the foregoing reasons, we find that the Respondents should take nothing by way of their Motions, and that they should be and are in all manner denied.

IT IS SO ORDERED.

Larry S. Landis, Commissioner

Lorraine Hitz-Bradley, Administrative Law Judge

Date: 9/14/05